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IN THE SUPREME COURT OF MISSISSIPPI

No. 37,524

A. H. STONE, Chairman State Tax Commission,
Appellant,

vs.

REICHMAN-CROSBY COMPANY
Appellee

JURISDICTIONAL STATEMENT

I

Statute Sustaining Jurisdiction and Nature of the Case

Section 237 (b) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A., 344(b) is believed to sustain the jurisdiction of the Supreme Court of the United States.

This is an appeal from a judgment of the Supreme Court of Mississippi, wherein appellee, Reichman-Crosby Company was allowed to recover from A. H. Stone, Chairman of the State Tax Commission of Mississippi, the appellant herein, the sum of Seventy-Five Dollars ($75.00) alleged to be taxes paid by the appellee under protest, as the taxes collected under authority of the Mississippi statute involved in this litigation, the judgment rendered by the Court of Mississippi allowing recovery of said sum of money, as well

as the interest and costs. The amount of money paid by the appellee, and which it was allowed to recover by said judgment, was paid as a result of a demand made by the appellant, as the Commissioner, authorized and required by the terms of the statute to require the collection of the Use Tax imposed by the statute in question, by the seller of merchandise sold to Mississippi purchasers as a result of orders solicited and taken by representatives of the seller present in Mississippi for said purpose. The recovery of the amount paid by the seller was allowed by the Mississippi Court on the theory that the statute requiring such collection by the seller is repugnant to the Commerce Clause of the Constitution of the United States and void.

II

State Statutes, the Validity of Which Are Involved

The statutes of the State of Mississippi, the validity of which are brought in question, are contained in Sections 3, Chapter 120, Laws of Mississippi for 1942, being Section 10148 of the Code of Mississippi for 1942; Section 6 of Chapter 120, Laws of 1942, being Section 10151 of the Mississippi Code of 1942, and Section 2, Chapter 120, Laws of Mississippi for 1942, being Section 10147 of the Mississippi Code of 1942, said sections of the law reading as follows:

> Sec. 3. "There is hereby assessed and levied to be collected as hereinafter provided, upon every person in this state, a tax or excise for the privilege of use, storage, or consumption, including the personal use of the person, within this state, of any article of tangible personal property, either purchased at retail or produced or manufactured for commercial use or rented or leased, and the tax shall apply to persons receiving the benefits from the services of dyeing, cleaning or laundering."

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Sec. 6. "Every person maintaining a place of business in this state and making sales of tangible personal property for use in this state, or rendering services in this state for which a tax is imposed, and not exempted under the provisions of this act, shall at the time of making sales or rendering such services, whether within or without the state, collect the tax imposed by this act from the purchaser or the recipient of the service and he shall give to the purchaser or to the recipient of the service a receipt therefor in the manner and in the form prescribed by the commissioner if the commissioner shall by regulation, require such receipt. Each person maintaining places of business both within and without the state shall furnish the commissioner with a list showing the names and addresses of all of his agents operating in the state, and the locations of any and all of his distribution or sales houses or offices, or other places of business in the state."

Sec. 2. "The term 'retailer maintaining a place of business in the state' or any similar term, shall mean and include any retailer, distributor, wholesaler or manufacturer or person in business of rendering a service, having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales room or house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer, distributor, wholesaler or manufacturer, or person in business of rendering a service, or their subsidiaries, irrespective of whether such place of business or agent is located within this state permanently or temporarily, or whether such retailer, distributor, wholesaler, or manufacturer, or person in business of rendering a service, or his subsidiary, is admitted to do business within this state under its general laws."

III

Dates of Judgment and Appeal

The final judgment of the Supreme Court of Mississippi was rendered on November 28, 1949, said judgment being

a reiteration of, and making reference to the former judgment rendered by the Court on October 11, 1948. The brief of the appellant herein, on the second appearance of said cause before the Supreme Court of Mississippi being the equivalent of a repetition of the Suggestion of Error filed by the appellant to the judgment previously rendered by the Court on October 11, 1948, the original Suggestion of Error having been overruled by the Court and the brief of the appellant in the second appearance of the case being likewise overruled, it was not deemed necessary to file an additional Suggestion of Error to the last opinion, the Court having stated positively that the original opinion established the law of the case, which was invoked in the last opinion.

Petition for appeal to this Court was presented to the Honorable Harvey McGehee, Chief Justice of the Supreme Court of Mississippi on the 12th day of January 1950, and the appeal was allowed by him on the same day.

IV

Manner in Which Federal Question Was Raised

The invalidity of the Mississippi statute was charged in the declaration of the appellee herein in its original pleading filed in the Circuit Court of Hinds County, Mississippi, said charge of violation of the Commerce Clause and the Due Process Clause of the United States Constitution was the basis on which recovery of the amount paid was sought in the declaration. In the declaration filed on behalf of the plaintiff in the lower court, the appellee herein, the constitutionality of the statutes invoked was attacked as in violation of the Commerce Clause of the Constitution of the United States, and it was likewise charged that requirement of collection of the tax by the seller was depriving the seller of its property without due process of law. The pleadings of the defendant in the lower court, the appel-

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lant herein, denied specifically the unconstitutionality of the statutes, both in the demurrer originally filed, and the Answer filed upon the cause being remanded to the trial court.

The Supreme Court of Mississippi held on both appearances of this cause before it that the provisions of the statute requiring a nonresident seller to collect the tax was unconstitutional and in violation of the Due Process clause of the United States Constitution, the opinions of the Court being directly predicated upon a decision of this Federal question, although the Supreme Court of the United States had previously held in the case of *General Trading Co.* v. *State Tax Commission of Iowa,* 322 U. S. 335, that an identical provision of the Iowa statute did not violate the United State Constitution. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, 66 L. Ed. 227; *Danke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 66 L. Ed. 239; *Fleming* v. *Rhodes,* 331 U. S. 100.

V

The Federal Question Involved Is Substantial

The case involves facts which were not disputed as to the plaintiff in the lower court, the appellee herein, having at least eight traveling salesmen, two of whom resided in the State of Mississippi, and each of said salesmen traveling in the State of Mississippi for the express purpose of soliciting orders from Mississippi purchasers of the merchandise sold by the appellee herein, as a result of such orders so taken. It was admitted in the Agreed Statement of Facts that practically all of said sales were made on terms of 30 days, and for its own protection the seller, the appellee herein, added the two per cent Use Tax to the price of the merchandise sold, and collected the tax through the addition of the amount thereof to the invoice price of the merchandise sold for a long period of time

before the final trial of this cause in the lower court, although no facts appeared in the record with reference to whether or not the tax had actually been collected by the seller prior to the time that the suit was filed.

The tax imposed by the statute is two per cent of the purchase price, and since the statute imposed the tax primarily on the purchaser, which the Supreme Court of Mississippi decided was a valid imposition, and the seller only being required to collect the tax for the benefit of the State of Mississippi, no hardship was imposed on the seller, since the purchaser was cognizant of the fact that each purchaser would be liable for the tax of two per cent of the cost of the merchandise for the privilege of the use thereof in the State of Mississippi. And since the Mississippi Courts are always open to the nonresident seller for the purpose of collecting the purchase price of the articles sold, and the Supreme Court of Mississippi having held that the tax imposed under the Sales Tax Law, became a part of the purchase price which the seller of the merchandise could recover by suit, the same as the purchase price was collected, then it was the contention of the Commissioner that the State of Mississippi gave something in return for the service demanded of the nonresident seller in collecting the tax due to the State of Mississippi.

Where a "Federal question" is raised in connection with the construction of any statute, whether Federal or State, the State courts' characterization of the tax is not conclusive. *United States* v. *Allegheny County,* 322 U. S. 174, 88 L. Ed. 1209; *Reconstruction Finance Corp.* v. *Beaver County, Pa.,* 328 U. S. 204, 90 L. Ed. 1172; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69, 91 L. Ed. 80.

The statute, in terms, imposes a tax on the purchaser of merchandise who brings it into the State for use instead

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of attempting to collect the tax from the multitude of purchasers whose identity is unknown, the statute makes the seller of the product its agent for collecting the tax in return for the protection which the State, through its courts, gives to the seller of the product and to recover the purchase price if not paid when due. And it has been said by this Court, "This is a common and entirely lawful arrangement". *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Nelson, Chairman State Tax Commission, et al.* v. *Sears-Roebuck & Co.*, 312 U. S. 359; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, and finally and conclusively, *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335.

A proper construction of the statutes involved and the purpose thereof is of vast importance to the State of Mississippi. Since the decision of the Supreme Court of the United States in the case of *General Trading Co.* v. *State Tax Commission of Iowa, supra*, the commercial world has accepted the construction placed on the statute by the Commissioner charged with the duty of administering the law, and has recognized the right of the Commissioner to require the collection of the tax from the purchaser of merchandise by the seller, especially when sold as a result of orders taken by representatives of the seller, while present in the State of Mississippi for the purpose of soliciting such orders. And by reason of the acceptance by the commercial world of this provision of the law, hundreds of thousands of dollars have been collected through this source which it would be impossible to collect if it were left to the voluntary act of the purchaser to make report of all purchases and pay the taxes imposed by the statute upon the use of the property purchased and brought into the State for use. Hence, the financial welfare of the State of Mississippi would be so vitally affected, and has been affected as a result of the decision of the Supreme Court of Missis-

sippi, that many sellers of merchandise throughout the country who have heretofore accepted the responsibility of collecting the tax and paying it into the State of Mississippi, have discontinued this practice to the great financial detriment to the State of Mississippi.

In support of the contention that the Supreme Court of the United States has jurisdiction of this matter, I respectfully refer to the cases of *Williams* v. *Bruffy*, 102 U. S. 248; *Cissna* v. *Tennessee*, 246 U. S. 289; *Southern R. R. Co.* v. *Clifts*, 260 U. S. 316; *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Honeyman* v. *Hanan*, 300 U. S. 14; *Titus* v. *Wallace*, 306 U. S. 282, and *Wilson* v. *Cook*, 327 U. S. 474.

VI

Opinions of Court Below

Appended to this statement are copies of opinions of the Supreme Court of Mississippi, rendered in this case on October 11, 1948, and November 28, 1949.

VII

Conclusion

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by Section 237, Judicial Code, as amended by Section 344 (b).

Respectfully submitted:

J. H. Sumrall,
Attorney for Appellant.

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

In Banc:

No. 36,818

REICHMAN-CROSBY COMPANY

vs.

A. H. STONE, Chairman State Tax Commission

McGEHEE, J.

OPINION OF OCT. 11, 1948

This is a suit to recover, in the manner provided by law, the sum of seventy-five dollars in Use Taxes paid, under protest, to the appellee, A. H. Stone, Chairman of the Tax Commission of Mississippi, by the appellant, Reichman-Crosby Company, non resident corporation of Tennessee. A demurrer filed by the Tax Commission was sustained by the trial court to the declaration of the appellant, and upon failure of the plaintiff to amend, the suit was dismissed and final judgment was entered denying the recovery sought.

On this appeal the constitutional power and authority of the state to levy the tax against the user of the tangible personal property purchased by residents of this state upon orders taken by the nonresident seller's travelling salesmen, who resided in Memphis where the orders were sent for acceptance or rejection, is not questioned.

The appellant challenges only the right of this state to require such a nonresident seller of tangible personal property to collect from its purchasers and pay the tax to the appellee "at the time of making sales", (which are consummated at Memphis, Tennessee) for the reason that, according to the provisions of our Use Tax Law, it is declared that the tax "shall not apply with respect to the * * * use * * * of any article of tangible personal property sold * * * outside of this state until the transportation thereof has finally ended and such article has become com-

mingled with the general mass of property within this state."

The power of the state to require the nonresident seller to act as its tax collector in the premises is further challenged on the ground that such seller in the case at bar is not doing business in this state under the principles announced by any prior decision of this Court where the seller has no office, place of business or resident agent in this state, and has not qualified to do business here under our laws, and has not appointed a resident agent for the service of process here, and is engaged in no local activity in Mississippi within the meaning of our previous decisions as to what constitutes doing business in this state; that is to say, the appellant questions the constitutional power and authority of the state to make a tax collector out of a nonresident seller over which it has no territorial jurisdiction, since the seller is not present here within the contemplation of our own legal jurisprudence and within the meaning of all the decisions of the Supreme Court of the United States, except that which was rendered in the case of General Trading Company, doing business as Minneapolis Iron Store *v.* State Tax Commission of the State of Iowa, 322 U. S. 335, 88 L. Ed. 1309, which is deemed not to be controlling in the instant case for the reasons to be hereinafter stated.

The property for the use of which the tax was demanded of and paid by the appellant is alleged in the declaration to have been sold on orders taken by the nonresident salesmen, who were soliciting agents of the appellant, and to have been delivered to a common carrier at Memphis for transportation to purchasers residing in Mississippi, resulting in the completion of such sales in Tennessee.

The tax is levied against the user of the property in Mississippi, and our Use Tax Law, Chapter 120, Laws of 1942 (Secs. 10146 to 10167, both inclusive, Code of 1942) provides that the same "shall not apply with respect to the * * * use * * * of any article of tangible personal property sold * * * outside of this state until the transportation thereof is finally ended and such article has become commingled with the general mass of property within the state * * *."

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The act further provides that "Every person maintaining a place of business in this state and making sales of tangible personal property for use in this state, * * * shall at the time of making the sales * * *, whether within or without the state, collect the tax imposed by this act from the purchaser * * * and receipt therefor in the manner and form prescribed by the commissioner, if the commissioner shall, by regulation, require such receipt; "that" the term 'retailer maintaining a place of business in this state', or any similar term, shall mean to include any retailer, distributor, wholesaler or manufacturer * * * having or maintaining within this state * * * an office, distribution house, salesroom or house, warehouse or other place of business, *or any agent operating within this state* under the authority of such retailer, distributor, wholesaler or manufacturer * * *, irrespective of whether such place of business or agent is located within this state permanently or temporarily, or whether such retailer, distributor, wholesaler or manufacturer * * *, is admitted to do business in this state under its general laws." (Italics ours.)

The act assesses and levies by a general provision a tax upon "any person who uses, * * * any property upon which a tax is herein imposed * * * upon which the tax has not been paid to the commissioner, as herein provided for", and declares that such person shall be liable therefor and shall pay the tax upon notice and demand by the commissioner as therein provided.

The act also provides that, "The tax herein imposed, * * * in addition to being a tax against the property, business, trade or occupation, it shall constitute a tax due the state by the person owing the tax, *or the person required or authorized to collect it.*" (Italics ours.)

It is further provided in the act that, "It shall be unlawful for any person subject to the provisions of this act to fail or refuse * * * to pay the tax herein imposed * * *;" and "that any person violating any of the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or if he be an individual, imprisoned not exceeding six months in the county jail, or

punished by both such fine and imprisonment, at the discretion of the court; and it is further provided that anyone failing or refusing to comply with the provisions of the act may be proceeded against by injunction to prevent the continuance of his business in this state."

The Use Tax imposed is equal to two per cent of the purchase price of the property, and it does not apply where the property has already been included in the measure of our Two Per Cent Sales Tax Law or the sales tax imposed by some other state in an amount equal to or greater than such Use Tax.

It is declared that the primary purpose of the tax is "to protect, insofar as may be proved practicable, the merchants, dealers, manufacturers * * * who meet the requirements of the Mississippi sales tax law against the unfair competition or importation of goods * * * into Mississippi without the payment of the retail sales tax imposed for the sale of goods, wares or merchandise usually carried for sale in this state * * *."

As hereinbefore stated, it is not contended that the tax is unconstitutional as against the user of tangible personal property purchased outside of the state over whom the state has jurisdiction and who enjoys the protection of its laws in the use and enjoyment thereof, but that as to the seller it is unconstitutional (1) for the reason that it violates the commerce clause as a burden on interstate commerce, in that the non resident seller is required to become a surety or be responsible for the collection of the tax before any liability therefor has become fixed against the purchaser, and is not in a position to protect himself in the manner available to a local retail merchant in the state, who is able to collect the tax when the sale is being consummated by placing the goods back on the shelf if the purchaser fails to pay a two per cent sales tax; that is to say, that he must credit the purchaser and run the risk as to being reimbursed after the property comes to rest in this state and the liability of the user accrues, or he must forego making the sale; and (2) that he is denied the equal protection of the laws guaranteed by the Federal Constitution for the reasons stated under numeral No. one; and (3) that the requirement

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as to him violates the due process clause of the Federal Constitution in that although he is not present in the taxing state subject to its jurisdiction, he is required to take notice of the statutes of a foreign state at the time of making a sale in his own state and collect the proper amount imposed by the Use Tax Law, notwithstanding that such taxing state has not conferred upon him the right to engage in interstate commerce—a right guaranteed by the federal government, and which the state government is prevented from withholding, in the exercise of which right the law of the state affords no protection as a local activity.

It is unnecessary that we emphasize these contentions, because to merely state them is to show their correctness, unless their force is negatived by decisions of the Supreme Court of the United States, since under our own decisions a nonresident seller engaged exclusively in interstate commerce in the manner hereinbefore mentioned is neither subject to the state's taxing power nor to the state's jurisdiction to subject it to personal liability for failure to collect and pay a tax levied against the citizens of this state.

The right of a state to assess a Use Tax against a resident thereof for the use therein of property which has been transported to him in interstate commerce is clearly upheld by the Federal Supreme Court in the following cases:

Monamotor Oil Co. *v.* Johnson, 292 U. S. 86, 78 L. Ed. 1141; Henneford *v.* Silas Mason Co., 300 U. S. 577, 81 L. Ed. 814; Felt & Tarrant Co. *v.* Gallagher, 306 U. S. 62, 83 L. Ed. 488; Nelson *v.* Sears, Roebuck & Co., 312 U. S. 359, 85 L. Ed. 888; Nelson *v.* Montgomery Ward & Co., 312 U. S. 373, 85 L. Ed. 897; McLeod *v.* Dilworth, 320 U. S. 728, 88 L. Ed. 430; and General Trading Company *v.* Tax Commission, 322 U. S. 335, 88 L. Ed. 1309. The above enumerated cases were cited in the majority opinion rendered in the General Trading Co. *v.* State Tax Commission, supra, to support the decision therein rendered.

In some of the cases above mentioned, the right of the state to require the Use Tax to be collected by the nonresident seller was not involved. In the case of Monamotor Oil Co. *v.* Johnson, supra, the oil distributor, who was required to collect the tax, had itself received the oil in the

taxing state for distribution there, and the state, of course, had territorial jurisdiction to require it to collect and pay the tax. In Henneford *v.* Silas Mason Co. supra, the right to require the seller to collect and pay the tax was not involved. In Felt & Tarrant Co., the right to require the seller to collect the Use Tax was involved, but the nonresident seller had two general agents in two separate areas of the taxing state for whom it rented offices under leases in its own name, paying the rent therefor, and to which agents it shipped its comptometers for delivery to the respective purchasers there, and into which state it sent demonstrators for the machines; and the seller was therefore held to have maintained places of business within the state and to be doing business there.

In the cases of Nelson *v.* Sears, Roebuck & Co., and Nelson *v.* Montgomery Ward & Co., supra, the nonresident sellers were maintaining retail stores in the taxing state, and the precise question involved, was whether the sellers were required to collect and pay the Use Tax on its mail order business from customers throughout the state who did not purchase through the local stores. The right to require the seller to collect and pay the Use Tax was upheld (1) for the reason that the court considered that the mail order business was a part of the general business being done as a whole through its local stores and otherwise in the state; and (2) for the obvious reason that since the sellers were doing business in the state, they were subject to its territorial jurisdiction.

In McLeod *v.* Dilworth, supra, the Arkansas sales tax was held not to be collectible from a nonresident seller, on the ground that the sale made in Memphis on orders received from Arkansas was not taxable on account of the commerce clause. No Use Tax was involved, but the court distinguished a sales tax from a use tax by saying that the former is a tax on the freedom of purchase, while the Use Tax is a tax on the enjoyment of that which is purchased.

This review of these cases, which we think are clearly distinguishable from the case at bar, brings us to a consideration of the only case in the decisions of the Supreme

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Court of the United States which upheld the right of a state to require a Use Tax to be paid by a nonresident seller which was only shipping goods into the taxing state on orders taken by its travelling salesmen there and later filled by delivery of the articles to a common carrier at Minneapolis to be shipped to the purchasers in Iowa, and where the seller was not doing business in the taxing state within the meaning of the Mississippi decisions, but was doing business in Iowa according to a decision of the Supreme Court in that state—General Trading Company, etc. *v.* State Tax Commission of the State of Iowa, 233 Iowa 877, 10 N. W. (2d) 569, 322 U. S. 335, 88 L. Ed. 1309. Therein the state court had held that the General Trading Company was a "retailer" maintaining a place of business in Iowa under the same facts and circumstances as are present in the case at bar in regard to its method of conducting its interstate business. It had evidently so held on the sole ground that the legislature of Iowa had declared by statute that the "term" 'retailer maintaining a place of business in this state', or any similar terms, shall mean and include any retailer having or maintaining within this state, * * * an office, distribution house, sales house, warehouse, or other places of business, *or any agent operating within this state* under the authority of the retailer, * * * irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state. (Italics ours.) The distinction here is that the Supreme Court of the State of Mississippi has never held that a nonresident is "a retailer maintaining a place of business in this state" from the mere fact that it may have a soliciting agent operating within the state for the purpose of taking orders to be sent to his nonresident principal for acceptance or rejection and to be filled by shipments in interstate commerce where such nonresident seller maintains no office or other place of business here, and where such seller is engaged in no local activity under the protection of our laws, and where it is not qualified to do business within the state by appointing an agent for the service of process; that is to say, where it is not in fact doing business in this state in such a manner

as to be present here. All of our decisions are directly to the contrary.

The provisions of our Use Tax Statute and those of the state of Iowa are substantially the same in all material respects, except that the Iowa statute does not contain the provisions that the tax "shall not apply with respect to the * * * use * * * of any article of tangible personal property sold * * * outside of this state until the transportation thereof is finally ended, and such articles has become commingled with the general mass of property within this state * * *."

In the case of General Trading Company *v.* State Tax Commission etc., supra, the majority opinion by the United States Supreme Court appears to have been influenced by the fact noted therein that "The application by that court (Iowa) of its local laws and the facts on which it founded its judgment are, of course, controlling here. * * * Upon these facts and its holding that trading company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this Use Tax on Iowa purchases, and that collection *could validly be made through the trading company.*" (Italics ours.) The Supreme Court of Mississippi would not have held, as did the Iowa Court, that the state could require the trading company to collect and pay the taxes, since to do so would be contrary to all of the previous decisions of this Court as to what constitutes maintaining a place of business, or doing business in this state. Our decisions would have required that we should hold the question as what constitutes doing business in the state, territorial jurisdiction, and due process of law to be a judicial one, and that we were not bound by a legislative declaration or definition as to what would constitute doing business, territorial jurisdiction or due process of law, unless such declaration or definition was sanctioned or authorized by constitutional limitations.

In the case of Philadelphia & Reading R. R. Co. *v.* McKibbin, 243 U. S. 264, the Court, speaking through Mr. Justice Brandeis, announced the rule to be as follows: "A

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foreign corporation is amenable to enforcing a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present here."

The appellant in the case at bar was not doing business in this state and was not present here within the principles announced by this Court in the following cases: First National Bank *v.* Mississippi Cotton Seed Products Co., 171 Miss. 282, 157 So. 349; Item Co. *v.* Shipp et al., 140 Miss. 699, 106 So. 437; Smith et al. *v.* Seabury Corporation, 192 Miss. 563, 6 So. 2d 591; Stone *v.* General Contract Purchase Corporation, 193 Miss. 301, 7 So. 2d 806; Stone *v.* General Electric Contracts Corporation, 193 Miss. 317, 7 So. 2d 811; A. H. Stone *v.* Memphis Natural Gas Co., 201 Miss. 670, 29 So. 2d 268, affirmed by the U. S. Supreme Court in Advance Sheet 16, vol. 68, Sup. ct. Rep. 1475; and the very recent case of Craig *v.* Olan Mills Portrait Studios, 33 So. 2d 801. In the last four of the above cited cases, this Court upheld the right to collect an excise tax on the sole ground that the nonresidents involved were engaged in local activities in this state and were enjoying rights here under our laws which were conferred and protected by the state. However, a nonresident does not get from the state its right to engage exclusively in interstate commerce.

It is true, of course, that a state in the exercise of its sovereign power may artificially define anything or any activity *which is subject to its jurisdiction.* But this Court held in the case of Lee *v.* Memphis Publishing Co., 195 Miss. 264, 14 So. 2d 351, that the defendant was not doing business in this state in such a manner as to be present and amenable to process and suit here, even though the legislature had declared that any corporation which "shall do *any* business or perform *any* character of work or service in the state shall by the doing of such business or the performance of such work or service" (italics ours) be deemed to have appointed the secretary of state as its agent for the service of process in any action growing out the doing of such business or the performance of such work. The said publishing company was engaged in distributing about forty thousand copies of its daily Commercial Appeals in

this state, and even though its activities were immeasurably greater than those involved in the instant case, we held that it was not doing business here, notwithstanding the artificial definition given by the legislature, and that to subject it to suit in the State of Mississippi would be denying due process of law.

If the courts of the state have no jurisdiction over the appellant, Reichman Crosby Company, in the case at bar, then how can it be said that the legislature would have jurisdiction over it to require the performance of the duties sought to be imposed by our Use Tax statute? Tax statutes are enacted upon the theory that the taxing authorities may invoke the aid of the courts to enforce compliance therewith, if need be, but in the instant case if the appellant had declined to pay the tax on demand, we know of no power vested in the courts of this state to enforce collection thereof, together with the penalties sought to be imposed for such default.

The remedy provided by the Use Tax Law of enjoining the seller from continuing in business in this state is not available because it is not doing business here according to our decisions; nor can its agents be prevented from soliciting orders for the purchase and transportation of goods exclusively in interstate commerce, since the Commerce Clause of the Federal Constitution forbids the state taking such action. Moreover, the seller is not shown to have any property, or liens on property, located in this state that are protected by our laws for their enforcement, as in the cases of Stone *v.* General Contract Purchase Corporation, supra, and other like cases; and being engaged in no local activity here, the seller is not present within the jurisdiction of either the courts or the Legislature of this state.

The dissenting opinion of Mr. Justice Jackson, concurred in by Mr. Justice Roberts, in the case of General Trading Company *v.* State Tax Commission, supra, is at least a correct pronouncement of the law as applied to the case at bar where the Supreme Court of Mississippi has not construed its local laws in the manner in which the Iowa Supreme Court had construed its laws—a factor which the

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majority opinion in the General Trading Company case seems to have recognized as controlling there.

We are, therefore, of the opinion that while our Use Tax law is constitutionally valid as applied to the user in this state of tangible personal property purchased outside of the state, it is unconstitutional as to its requirement that the nonresident seller shall collect and pay the tax under the facts and circumstances of this case; and that, therefore, the trial court was in error in sustaining the demurrer which admitted the facts alleged in the declaration as to the appellant's sole method of doing business with its Mississippi customers, which was only in interstate commerce and involved no local activities, or its presence, such as to constitute doing business in this state, and that the case must therefore be reversed and remanded.

Reversed and remanded.

IN THE SUPREME COURT OF MISSISSIPPI

In Banc:

No. 36,818

REICHMAN-CROSBY COMPANY

vs.

A. H. STONE, Chairman State Tax Commission

MONTGOMERY, J. Dissenting.

This Court, in the decisions listed in the majority opinion, has heretofore decided what does and does not constitute doing business in this State. In none of these cases had the Legislature defined what constituted doing business within the meaning of the act in question, and no decision was upon any such legislative definition.

In the case before us, the Legislature has, under Section 2 of Chapter 120, Laws of 1942, defined the term "retailer maintaining a place of business in this state", as follows:

"The term 'retailer maintaining a place of business in this state' • • • shall mean and include any retailer • • • having or maintaining within this state, directly or

by a subsidiary • • • any agent operating within this state under the authority of the retailer • • • irrespective of whether such agent is located within this state permanently or temporarily or whether such retailer • • • is admitted to do business within this state under its general laws."

This legislative definition is contrary to the former holdings of this Court on what constitutes doing business within the State. What the Legislature says, as above set out, shall constitute doing business within the State, would not, under the former decisions of this Court, come within the meaning of that term.

Is the Legislature bound by the decisions of this Court as to what shall constitute doing business in the State, and is its power limited to the definitions proscribed by this Court? With all deference to my brethren, I think not.

The State Constitution is not a grant but a limitation on legislative power. The Legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State or Nation. State *v.* Edwards, 93 Miss. 704, 46 So. 964; St. Louis & S. F. Ry. Company *v.* Benton County, 132 Miss. 325, 96 So. 689. Hence, the State Legislature has all political power not withheld by the State Constitution, or in conflict with the Constitution of the United States. Hinton *v.* Board of Supervisors of Perry County, 84 Miss. 536, 36 So. 565. Constitutional restriction by implication of the State's sovereign power to enact unlimited legislation for the public good is not favored, and the inhibition must appear plain and certain before it will be implied by the courts. Miller *v.* State, 130 Miss. 564, 94 So. 706; State *v.* Board of Supervisors of Grenada County, 141 Miss. 701, 105 So. 541. Where, as here, the State Constitution is silent on the subject of legislation, the Legislature is supreme so long as the act is not in conflict with the Constitution of the United States. State *v.* Speakes, 144 Miss. 125, 109 So. 129.

The majority opinion does not hold that there is any conflict between the act and any section of the State Constitution. It holds that the provision conflicts with the Federal Constitution. But in construing an identical act,

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the Supreme Court of the United States has held to the contrary in the case of General Trading Company, etc. *v.* State Tax Commission of the State of Iowa, 233 Iowa 877, 10 N. W. (2d) 569, 322 U. S. 335, 88 L. Ed. 1309, where it holds that such an act does not conflict with the Federal Constitution.

Where a question is Federal in its nature, the decisions of the Supreme Court of the United States are absolutely binding on the various state courts, and must be followed, regardless of the views of the latter courts, and even though such decisions are inconsistent with prior decisions of the state courts. 21 C.J.S., Sec. 206, p. 365; Chesapeake & O. Ry. Company *v.* Martin, 51 S. Ct. 453, 283 U. S. 209, 75 L. Ed. 983. So the decisions of the Federal Court are binding as to the construction of the Federal Constitution. State of South Carolina *v.* Bailey, 53 S. Ct. 667, 289 U. S. 412, 77 L. Ed. 1292; 21 C.J.S. Sec. 206, p. 366, the cases there cited under Note 32.

There is nothing in the State Constitution to limit the power of the Legislature to act in this matter in the manner in which it has acted, and the Supreme Court of the United States has held in General Trading Company, etc. *v.* State Tax Commission of the State of Iowa (supra) that there is nothing in the Federal Constitution to restrict the power of the Iowa Legislature to so act, and it seems to me, therefore that the power of the Mississippi Legislature, as exercised, is supreme.

The effect of the majority opinion, in my humble judgment, amounts to a rejection of the decision of the Supreme Court of the United States in General Trading Company, etc. *v.* State Tax Commission of the State of Iowa (supra) and, as I comprehend the law, this Court does not have that power on a question of the construction of the Federal Constitution.

IN THE SUPREME COURT OF MISSISSIPPI

No. 37,524

In Banc:

A. H. Stone, Chairman State Tax Commission

vs.

Reichman-Crosby Company

Opinion of November 28, 1949

Smith, J.

This litigation started on March 10, 1947, when appellee filed its declaration against appellant, whereby the former sought to recover from the latter the sum of $75 paid under protest as Use Taxes collected during the period from December 15, 1945, to December 15, 1946, by the appellee. The statutes involved are Chapter 120, Laws 1942, Sections 10146 to 10167, inclusive, Code 1942; as amended by Chapter 457, Laws 1948. By the latter Act, effective April 12, 1948, the Legislature amended Sections 1, 2, 3, and 4 of the 1942 Act, being Sections 10146, 10147, 10148, and 10149 of the 1942 Code.

This case has been before us previously. Reichman-Crosby Company *v.* Stone, 204 Miss. 122, 37 So. (2d) 22, decided October 11, 1948. At the first trial in the Circuit Court of the First Judicial District of Hinds County, the appellant here, the appellee there demurred to the declaration of the appellant there, who is appellee here. This demurrer was sustained, and upon failure to amend, the suit was dismissed and judgment was entered denying the recovery sought. On appeal, we reversed and remanded the cause for a trial on the merits.

Thereupon, the case was tried anew, and resulted in a judgment granting the recovery sought, whereupon appellant, Stone, Chairman of the Mississipppi State Tax Commission, brought the case here on appeal.

In the former appeal we held that since Reichman-Crosby Company was a non-domesticated foreign corporation, having no place of business of any agent in this State, its only intra-state activity being the sending into the State of

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non-resident solicitors to take orders effective only when approved at the home office, it could not be made a collecting agent for the use tax on goods sold by the corporation on orders taken as stated, when the sales had been completed by the delivery of the goods to a common carrier in the foreign state, the statute being unconstitutional in its requirement that the foreign seller must collect and pay the tax under such circumstances. Sections 10146-10167, Code 1942.

It is to be remembered that the original bill did contain this allegation: "* * * that its method of doing business was and is that it has traveling representatives, non-residents of the State of Mississippi, whose sole function and authority is to solicit and obtain from prospective customers in Mississippi orders for goods, which said orders are sent to the Memphis office of plaintiff for acceptance or rejection and which are in nowise binding upon plaintiff until accepted; that upon acceptance, the goods and merchandise are not delivered by plaintiff to the purchaser in Mississippi, but are delivered to a common carrier in Memphis, Tennessee, for transmission to purchasers." The demurrer admitted, of course, all of this allegation, including that the salesmen were non-residents of Mississippi. In the agreed statement of facts, however, on this point, it was stipulated: "* * * two of the traveling salesmen representing plaintiff reside in Mississippi. * * * The Reichman-Crosby Company has six men altogether, traveling in the State of Mississippi for the purpose of soliciting orders from residents of Mississippi for merchandise. Only two reside in Mississippi. The Reichman-Crosby Company does not require these two traveling salesmen, or any of its salesmen, to live in the State of Mississippi. These two salesmen live in the State solely of their own volition and not by reason of any requirement of the Reichman-Crosby Company. These two salesmen get the same compensation they would get if they lived outside of the State of Mississippi. Their residence of the State of Mississippi. Their residence in Mississippi is a matter of their own convenience and not for the convenience or benefit of plaintiff."

The statement of facts aforesaid also agreed that appellee here was a non-resident merchant in Memphis, Tennessee, selling, as stated supra, to purchasers in Mississippi, on orders taken as shown, prior to and since December 15, 1945. Furthermore, appellee "* * * has no office, distribution house, salesroom, house or warehouse of any kind in Mississippi, and the duties and authority of all of said salesmen traveling in Mississippi are limited to taking orders and mailing them to the home office of plaintiff in Memphis for acceptance or rejection. In other words, no traveling salesman has the right to make an outright sale of any of plaintiff's merchandise in the State of Mississippi. When orders are accepted by plaintiff the merchandise is delivered to a common carrier in Memphis, consigned to purchasers in Mississippi, F.O.B. Memphis."

It was further stipulated that there is a continuous flow of business by way of purchasers of Mississippi of the commodities sold by plaintiff in its regular course of business. "During the month of August, 1947, the total sales to Mississippi purchasers of plaintiff's merchandise amounted to $39,764.27 and for the month of February, 1948, the total amount of plaintiff's merchandise sold to Mississippi purchasers was $18,122.03, or a total of sales for said two months of $57,886.30. The month of August, 1947, was selected as being the highest amount of sales during that year and the month of February, 1948, the lowest amount of sales during that year. The two salesmen who resided in Mississippi sold 34.43 per cent of said total sales." Other sales were made by the other four non-resident salesmen traveling in Mississippi, orders received direct from customers through the mails, or by telephone, or in person, at the place of business in Memphis, Tennessee. "Fifty-five (55) per cent of said sales were exempt from taxation under express provisions of the Mississippi Use Tax Statute."

It was agreed that the two per cent Use Tax for August 1947, if due from appellee, was $370.09, and for February 1948, $134.90; that during the last six months of 1947 the two per cent of invoice prices of all merchandise sold customers in Mississippi not exempt from the Mississippi

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Use Tax amounted to $1,850.24. This two per cent was added to each invoice covering said sales, for plaintiff's protection, if plaintiff should be held liable therefor. The "plaintiff" is the "appellee" here.

By the agreement, it appears that appellee prepaid transportation charges on merchandise, both exempt and non-exempt from the Use Tax, shipped by it from Memphis, Tennessee, to purchasers in Mississippi, all of which was sold F.O.B. Memphis, Tennessee, the transportation charges being charged to the purchasers of the merchandise. Shipment was either by common carrier or United States parcel post service. None was shipped F.O.B. destination in Mississippi. Approximately all of the merchandise sold by appellee to its Mississippi Customers, including the merchandise referred to in the stipulation, was sold on thirty days credit terms.

It was expressly stipulated that "* * * subject to objection solely on the ground of incompetency, irrelevancy or immateriality, the following facts (as above) are agreed to be true and correct; and the same as hereinafter set forth, together with all admissions of the defendant's (A. H. Stone, Chairman, Tax Commission) answer herein, may be accepted by the court as fully as though proven by evidence offered in this cause, * * *". It was agreed that the case be tried by the judge without a jury.

Pursuant to the right of objection to the evidence, appellee objected to certain portions thereof, whereupon the following self-explanatory order was entered: "The plaintiff having moved the court to exclude and not to consider on the hearing and trial of this case all facts set forth in the stipulation herein filed, which relate to transactions occurring after the 31st day of December, 1946, on the ground that all such transactions occurred after the date the taxes involved in this present suit accrued, and, therefore, the same are incompetent, irrelevant, and immaterial on the trial of said cause: It is by the court ordered that said motion be and the same is hereby sustained." The effect of this was to eliminate from the case there and here all consideration of the data, statistics, and two per cent collections by appellee in August 1947, February 1948,

and during the year 1947. Appellant assigns this exclusion as error, but does not argue that it was error, or point out why it was erroneous, but, argues the case in his brief as if the evidence so excluded had not been excluded. However, it was excluded, and properly so, the period involved being December 15, 1945, to and including December 15, 1946.

The agreement was, as shown ante, that all admissions in appellant's answer be also taken as proven. Briefly, those admissions were: (Where not specifically also embraced in the agreed statement of facts) (1) That appellee is a corporation chartered under the laws of Tennessee, with its principal place of business in Memphis, Tennessee, and has never been domesticated or admitted to do business in the State of Mississippi as a foreign corporation, and has not appointed a resident agent as required by Section 5319, Code 1942. (2) That Alfred H. Stone, as Chairman of the Mississippi State Tax Commission, is charged with the duty, and clothed with the authority, to administer Chapter 120, Laws 1942, commonly known as the Use or Compensating Tax Law of Mississippi, and in the performance of this duty he made demand on appellee for payment of taxes accrued on account of sales made to purchasers in Mississippi, through orders solicited by representatives traveling through Mississippi for said purpose. (3) That appellee is engaged in selling machinery supplies, iron and steel products and material for various types of construction to purchasers in Mississippi. (4) That between December 15, 1945, and December 15, 1946, appellee sold to buyers in Mississippi, on orders solicited by its traveling representatives in Mississippi, merchandise on which the Use Tax was due, and which the statute required appellee to collect. However, it was also denied in the answer that the amount for which it was brought, $75, represented any specific sales of merchandise, it being alleged in appellant's answer to be only a "token" payment. It was admitted further by appellant's answer that on January 4, 1947, a payment was made of an arbitrary amount as such token payment in order to enable appellee to file suit in the courts of Mississippi for recovery of the

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taxes paid. (5) That Section 6 of the Act of 1942 does require that every person, maintaining a place of business in the State of Mississippi and making sales of tangible personal property within the state for use within the state, at the time of making the sales, whether within or without the state, collect the tax imposed by the act from the customer. (6) That Section 2 of the Act defines "a retailer maintaining a place of business in the state." (7) The Act does make any violation thereof a misdemeanor, subject to fine and imprisonment. (8) That Section 9 of the Act makes the Use Tax, and all penalties thereunder, not only a tax against the property, business, trade, or occupation but also a debt due the State by the person owing the tax, or the person required to collect it. Apposite this admission, the answer of appellant significantly included the following: "But such penalties could not be enforced against a non-resident seller as the Legislature never intended, even by implication, to confer jurisdiction over non-residents of the State of Mississippi to enforce any penalties of the law." This is a significant concession, inasmuch as no exception is made in the Act, and the question before us is the unconstitutionality of the legislation as applying compulsorily to non-residents, and requiring the non-resident in the case at bar, extra-territorially, to act as a tax collector for the State of Mississippi. (9) The answer of appellant concludes with the statement that Tennessee now (May 15, 1949 on which date the answer was filed) "* * * having a Sales Tax Law, and all sales consummated within the State of Tennessee being taxable at two per cent, the same rate of tax imposed by the Use Tax Law of Mississippi and the Use Tax Law of Mississippi specifically exempting from the tax imposed by said Act all purchases of merchandise made in states which require the payment of a Sales Tax on said Sales, are expressly exempted from the Use Tax Law of Mississippi," and hence it is claimed there is no hardship on non-resident seller in Tennessee now because of the Mississippi Use Tax Law. But, since it appears that this Tennessee Act was passed in 1947, while the period involved in this suit was December 15, 1945, to December 15, 1946, and hence the

Tennessee Act, styled "Retailer's Sales Tax Law", has no bearing on the issues of the case presently before us, even if applicable to the sales here involved, except to demonstrate that when appellee in 1947 and 1948 collected the taxes, evidence of which was excluded by the trial judge, the appellee was not required or authorized to collect any Use Tax on the shipments into Mississippi, since the purchaser had paid the Sales Tax to Tennessee. Therefore, by appellant's own showing, the appellee does not owe these collections to Mississippi, and they cannot be used to bar appellee's claim in the suit now before us. Such collections do not concern this State, even if appellee fails to refund them to its customers. The trial court was correct in excluding these facts from its consideration, and we take no further notice of them.

When the case was formerly submitted to us (204 Miss. 122, 37 So. (2d) 22) it was there contended, as it is contended here, that the United States Supreme Court settled the issue of this lawsuit when it affirmed the decision of the Supreme Court of Iowa in the case of State Tax Commission of the State of Iowa *v.* General Trading Company, 233 Iowa 877, 10 N. W. (2d) 659, 153 A.L.R. 602, in an opinion handed down by the Federal Tribunal in General Trading Company *v.* State Tax Commission, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309. We discussed that case fully in our former opinion, and will not repeat the discussion here. Suffice it to say that we decided contrary to appellant's contentions there, which applies with equal force here. We do, however, call attention to the reason given by the United States Supreme Court for affirming the Iowa case, which was: "The application by that court (Iowa Supreme Court) of its local laws and the facts on which it founded its judgment are of course controlling here. * * * Upon these facts and its holding that Trading Company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa Statute, the Iowa Supreme Court held that Iowa had not exceeded its powers * * *." Analogously, the Supreme Federal Court should accord to the Supreme Court of Mississippi the same potency as to its local laws and the

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application thereof to facts, as was done to the Supreme Court of Iowa, and, doubtless, would do so.

In this connection, it appears that appellant misconceives the basis of our former decision, since he argues with much earnestness the amendment of Section 3, Chapter 120, Laws 1942, by Chapter 457, Laws 1948, whereby there was eliminated from the former act, this provision: "The tax hereby imposed shall not apply with respect to the rental, or lease, or use, or storage, or consumption of any article of tangible personal property sold, produced or manufactured or processed outside of this state until the transportation thereof was finally ended and such article has become commingled with the general mass of property within this state, nor shall the tax apply to any service until the rendering of such service has been completed within this state to a person in this state."

We decided the constitutional question which we have stated, supra, and the repeal of this feature of the original act does not affect our conclusion formerly reached or the basis on which it was founded.

In our opinion in the prior appearance of this case here, we said: "The power of the state to require the non-resident seller to act as its tax collector in the premises is further challenged on the ground that such seller in the case at bar is not doing business in this state under the principles announced by any prior decision of this Court where the seller has no office, place of business or resident agent in this state, and has not qualified to do business here under our laws, and has not appointed a resident agent for the service of process here, and is engaged in no local activity in Mississippi within the meaning of our previous decisions as to what constitutes doing business in this state; that is to say, the appellant questions the constitutional power and authority of the state to make a tax collector out of a non-resident seller over which it has no territorial jurisdiction, since the seller is not present here within the contemplation of our own legal jurisprudence and within the meaning of all the decisions of the Supreme Court of the United States, except that which was rendered in the case of General Trading Com-

pany, doing business as Minneapolis Iron Store *v.* State Tax Commission of the State of Iowa, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309, which is deemed not to be controlling in the instant case for the reasons to be hereinafter stated."

As we have pointed out above, we will not repeat our reasoning, since it may be readily found on reading our former opinion. Since we construed our local laws and their application to the facts of this case, and since the Supreme Court of the United States declared in the Iowa case, "The application by the court of its local laws and the facts on which it founded its judgment are of course controlling here", we do not deem that case controlling on us, for that reason; in addition to the other reasons set forth in our former opinion.

This present situation is not a new case because the State of Tennessee is now claimed by appellant to have a relevant Sales Tax Law; because the coming to rest in this state feature of the original law has been eliminated; or even because two salesmen of appellee happen to reside in Mississippi for their own personal convenience and not that of appellee, in view of the ground on which we based our previous opinion. It is now the law of the case. We have held that the principles controlling the doctrine of "the law of the case" are more binding upon courts than the law of precedent, and a decision on a question of law decided on a former appeal of the same case will be adhered to on a subsequent appeal, though erroneous. W. J. Johnson *v.* Success Brick Machinery Company, 104 Miss. 217, 61 So. 178, 62 So. 4.

Appellant cites us to 14 Am. Jur., Sec. 124, and Pages 341 and 342, and quotes: "The strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrines of *stare decisis* subordinate to legal reason and justice and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error. Accordingly, the authority of precedents must often yield to the force of reason and to the paramount demands of justice as well

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as the decencies of civilized society and the law ought to speak with a voice responsive of these demands." This authority is called to our attention obviously in order to avoid the binding effect on us of the "doctrine of the law of the case." We, of course, agree with the language of the text, supra, but it has no application here, since it assumes that our holding in the former decision of this case was erroneous, and is without the force of reason and the paramountcy of justice and the decencies of civilized society. In our judgment our former opinion was correct and is now the law of this case, and we decline to overrule it.

The amendment in April 1948 of the 1942 Act, which eliminates that part of the latter providing that the Use Tax shall become due when the shipment shall come to rest in Mississippi and is commingled with the general mass of goods, does not affect our views previously and now held, for the reason that this was not the ultimate basis of our holding. And for the further reason that while the period of time involved in this litigation was December 15, 1945, to December 15, 1946, and the suit was filed in May 1947, we would have to construe the 1948 Act retroactively. Tax laws are construed most favorably to the taxpayer, and will always be given a prospective operation, unless the contrary intention is manifested by clear and positive expression. State ex rel. Knox *v.* Union Tank Car Company, 151 Miss. 797, 119 So. 310; Pan-American Petroleum Corporation *v.* Miller, State Tax Collector, 154 Miss. 565, 122 So. 393; Hester, Sheriff *v.* Copiah County, 186 Miss. 716, 191 So. 496; City of Lumberton *v.* Schrader, et al., 176 Miss. 272, 168 So. 77; Miss. Central R. Company *v.* Hattiesburg, 163 Miss. 311, 141 So. 897; Power, Secretary of State *v.* Calvert Mortgage Company, 112 Miss. 319, 73 So. 51.

Furthermore, the tax here is for the use or storage, and so forth, in Mississippi, and is not a Sales Tax in Tennessee, which manifestly our Legislature would not attempt. However, there can be no tax on use in Mississippi until there is use in Mississippi, and until the purchased property attains that status the tax could not be for a use

that had not occurred, and it would be simply a tax by Mississippi on sales in Tennessee. This would add to the unconstitutionality of the Act, as we see it.

Appellant challenges us to cite a section of the Mississippi Constitution which the applicable statute here involved may be said to violate. The Fourteenth Amendment to the United States Constitution provides that "No state shall * * * deprive any person of life, liberty, or property, without due process of law; * * *" Article III, Section 14, of the State Constitution orders that "No person shall be deprived of life, liberty, or property except by due process of law." The Supreme Court of the United States has declared: "That amendment (the fourteenth) conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty and property that previously existed under all State Constitutions." M. & O. R. R. Company, et al., *v.* State of Tennessee, et al., 153 U.S. 486, 38 L. Ed. 793. So that both the Mississippi and Federal Constitutions mean the same thing as to due process of law. This Court has said: "* * * if a provision in a State Constitution does not violate the due process of law prohibition of the Fourteenth Amendment to the Federal Constitution, it necessarily follows that a similar provision in a state statute does not violate the due process of law prohibition of the State's Constitution." Albritton *v.* City of Winona, 181 Miss. 75, 178 So. 799. The converse would also be true, of course.

In view of what we have said above, we therefore hold that the statute in question violates the due process clause of both State and Federal Constitutions.

The trial court having granted a judgment to appellee for the amount sued for, and, since we think, properly so, the judgment is affirmed.

Affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 653

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellant,

vs.

RIECHMAN-CROSBY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

S. RUFUS CREEKMORE,
Counsel for Appellee.

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STATUTES CITED

United States Code, Title 28:

Section 1257(2) 1
Section 1257(3) 1
Section 2103 1

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 653

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellant,

vs.

RIECHMAN-CROSBY COMPANY,
Appellee

STATEMENT OPPOSING JURISDICTION

Appellant undertakes to have this case reviewed by the Supreme Court of the United States under appeal procedure, although the statute cited as sustaining its jurisdiction, Judicial Code, Section 237 (b) (now United States Code, Title 28, Section 1257(3)), relates to review by certiorari rather than by appeal.

The decision of the Supreme Court of Mississippi was against the validity of the state statute drawn in question, and, therefore, cannot be reviewed on appeal, United States Code, Title 28, Section 1257 (2). But although the appeal is improvidently taken, we assume that this court will regard it as a petition for writ of certiorari (28 U. S. C. 2103) and in the exercise of its sound judicial discretion will either grant or deny the same.

I

The Judgment Rests upon an Adequate Non-Federal Ground and This Court, Therefore, Is Without Jurisdiction

The statute here involved was challenged by appellee as being violative of both the state and federal constitutions. The State Supreme Court upheld that contention, saying:

> "We, therefore, hold that the statute in question violates the due process clauses of both State and Federal Constitutions." (43 So. (2d) 191.)

The grounds underlying the decision of the Supreme Court of Mississippi are not left to surmise or conjecture, but are expressed in clear and unmistakable language. It was based on both federal and non-federal grounds, and the holding that the statute violated the due process clause of the State Constitution plainly presented a ground independent of any federal question in the case and sufficient in itself to sustain the judgment. Unquestionably the judgment in this case could have been rendered without deciding the federal question and since it alone was sufficient for a decision of the case, this court will not take jurisdiction.

Minnesota v. *National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920;

Lynch v. *New York*, 293 U. S. 52, 79 L. Ed. 191;

Flournoy v. *Wiemer*, 321 U. S. 253, 88 L. Ed. 708;

Fox Film Corporation v. *Muller*, 296 U. S. 207, 80 L. Ed. 158;

New York v. *Central Savings Bank*, 306 U. S. 661, 83 L. Ed. 1058;

Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206, 82 L. Ed. 751;

Radio Station WOW v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092.

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II

The Construction Placed upon This Statute by the Supreme Court of Mississippi, and Its Application to the Facts Are Binding upon This Court.

In *Minnesota* v. *National Tea Company*, 309 U. S. 551, 84 L. Ed. 920, Mr. Justice Douglas, speaking for the court said:

"It is fundamental that state courts should be left free and unfettered by us in interpreting their state constitutions."

In *Quong Ham Wah Company* v. *Industrial Accident Comm.*, 255 U. S. 445, 65 L. Ed. 723, the court speaking through Chief Justice White said:

"It is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state."

And in *Federal Trading Co.* v. *Iowa*, 322 U. S. 335, 88 L. Ed. 1309, Mr. Justice Frankfurter said:

"The application by that court (Supreme Court of Iowa) of its local laws, and the facts on which it founded its judgment are of course controlling here."

To the same effect are:

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770;

Montana v. *Rice*, 204 U. S. 291, 51 L. Ed. 490;

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107;

Nablett v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182;

Central Hanover Bank v. *Kelly*, 319 U. S. 94, 87 L. Ed. 1282;

Greenough v. *Tax Assessors*, 331 U. S. 486, 91 L. Ed. 1621.

In the present case the Supreme Court of the State of Mississippi, construing a local statute, as applied to facts undisputed, has held that appellee conducted no local activities in the State of Mississippi under the protection of its laws, and was not doing business in that state nor present there, so as to subject it either to the taxing power or the regulatory power of that state. Thus in its opinion on the first appeal the court said: (37 So. (2d) pp. 26, 27):

"The distinction here is that the Supreme Court of the State of Mississippi has never held that a nonresident is a retailer maintaining a place of business in this state, from the mere fact that it may have a soliciting agent operating within the state for the purpose of taking orders to be sent to his nonresident principal for acceptance or rejection and to be filled by shipments in interstate commerce where such nonresident seller maintains no office or other place of business here, and where such seller is engaged in no local activity under the protection of our laws, and where it is not qualified to do business within the state by appointing an agent for the service of process; that is to say, where it is not in fact doing business in this state in such a manner as to be present here. All of our decisions are directly to the contrary.

* * * * * * *

"The appellant in the case at bar was not doing business in this state and was not present here within the principles announced by this Court in the following cases: First National Bank *v.* Mississippi Cotton Seed Products Co., 171 Miss. 282, 157 So. 349; Item Co. *v.* Shipp, et al, 140 Miss. 699, 106 So. 437; Smith, et al. *v.* J. P. Seeburg Corporation, 129 Miss. 563; 6 So. (2d) 591; Stone *v.* General Contract Purchase Corporation, 193 Miss. 301, 7 So. 2d 806, 140 A.L.R. 1029; Stone *v.* General Electric Contracts Corporation, 193 Miss. 317, 7 So. 2d 811; A. H. Stone *v.* Memphis Natural Gas Co., 201 Miss. 670, 29 So. 2d 268, affirmed 335 U. S. 80, 68 S. Ct. 1475; and the very recent case of Craig *v.* Mills, Miss., 33 So. 2d 801. In the last four

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of the above cited cases, this court upheld the right to collect an excise tax on the sole ground that the nonresidents involved were engaged in local activities in this state and were enjoying rights here under our laws which were conferred and protected by the state."

And on the second appeal the court said: (43 So. (2d) pp. 189, 191)

"In our opinion in the prior appearance of this case here, we said (37 So. 2d 22, 23): 'The power of the state to require the nonresident seller to act as its tax collector in the premises is further challenged on the ground that such seller in the case at bar is not doing business in this state under the principles announced by any prior decision of this Court where the seller has no office, place of business or resident agent in this state, and has not qualified to do business here under our laws, and has not appointed a resident agent for the service of process, and is engaged in no local activity in Mississippi within the meaning of our previous decisions as to what constitutes doing business in this state; that is to say, the appellant questions the constitutional power and authority of the state to make a tax collector out of a nonresident seller over which it has no territorial jurisdiction, since the seller is not present here within the contemplation of our own legal jurisprudence and within the meaning of all the decisions of the Supreme Court of the United States, except that which was rendered in the case of General Trading Company doing business as Minneapolis Iron Store *v.* State Tax Commission of the State of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309, which is deemed not to be controlling in the instant case for the reasons to be hereinafter stated.'

"As we have pointed out above, we will not repeat our reasoning, since it may be readily found on reading our former opinion. Since we have construed our local laws and their application to the facts of this case, and since the Supreme Court of the United States declared in the Iowa case, 'The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here', we do not deem that case controlling on

us, for that reason; in addition to the other reasons set forth in our former opinion.

* * * * * * *

"In view of what we have said above, we therefore hold that the statute in question violates the due process clause of both State and Federal Constitutions."

III

The Federal Question Here Presented Has Been Foreclosed by Prior Decisions of This Court. It Is, Therefore, Unsubstantial, and This Court Will Decline Jurisdiction.

(a)

Since appellee was not doing business in the State of Mississippi within the meaning of the statute, as construed and applied by the Supreme Court of that State, the statute as applied to appellee is plainly violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Green v. *C. B. & Q. R. R. Co.*, 205 U. S. 530, 51 L. Ed. 916;

St. Louis Sw. Ry. Co. v. *Alexander*, 227 U. S. 218, 57 L. Ed. 486;

Phil. & R. R. Co. v. *McKibben*, 243 U. S. 264, 61 L. Ed. 710;

Peoples Tob. Co. v. *American Tob. Co.*, 246 U. S. 79, 62 L. Ed. 590;

International Shoe Co. v. *Washington*, 326 U. S. 310, 90 L. Ed. 95.

(b)

The Federal question presented by appellant has been foreclosed against him by the cases above cited. It is,

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therefore, so lacking in substantiality that this court will decline jurisdiction.

Utley v. *City of St. Petersburg*, 292 U. S. 106, 78 L. Ed. 1155;
Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 83 L. Ed. 231;
Seaboard Airline R. Co. v. *Watson*, 287 U. S. 86, 77 L. Ed. 180;
Wick v. *Chelare Elec. Co.*, 280 U. S. 108, 74 L. Ed. 212;
Lucht v. *King*, 260 U. S. 174, 67 L. Ed. 194;
Roe v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259;
Miller & Lux v. *Sacramento*, 256 U. S. 129, 65 L. Ed. 859;
King v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396.

Conclusion

For the reasons herein set forth it is respectfully submitted that the appeal herein should be dismissed, and certiorari should be denied.

Respectfully submitted,

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MARCH 27, 1950.

Per Curiam Decision.

No. 653. STONE, CHAIRMAN OF THE STATE TAX COMMISSION, *v.* REICHMAN-CROSBY CO. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *J. H. Sumrall* for appellant. *S. Rufus Creekmore* for appellee. Reported below: 43 So. 2d 184.